EDITOR'S NOTE

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86-1571

Case No._____
U.S. Supreme Court
Term Oct. 1986
RALPHS v. PARA
from Washington State
Supreme Court
PETITION FOR WRIT OF
CERTIORARI

IN THE SUPREME COURT OF THE UNITED STATES

ARTHUR M. RALPHS and
BARBETTA M. RALPHS,

husband and wife,
PETITIONERS

vs.

JOHN PARA and CLARA PARA,
husband and wife, and

TOM PARA and GAIL PARA,
husband and wife,

RESPONDENTS

NO._____

PETITION FOR WRIT
OF CERTIORARI

Respectfully submitted

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65pp

RULE 21 (a) and (b)

QUESTIONS PRESENTED FOR REVIEW (under U.S. Constitution Amendments V, VII, IX and XIV):

(1) May the Appellate Court of Washington bypass Washington case law criteria of "reasonable use" for loading and unloading on an easement, and decide this issue on a legal basis NOT PRESENTED BY EITHER PARTY?

(2) Does a state have a right to interfere with individual property rights guaranteed under the U.S. Constitution by failing to recognize prevailing state law concerning adverse possession and easements?

(3) Did the trial judge deny petitioners due process and equal protection as guaranteed under Fifth and Fourteenth Amendments by his actions whereby he prevented petitioners from presenting their theory of the case to the jury?

(These questions are expressed in "terms and circumstances of case" in the Argument.)

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RULE 21(3)--GROUNDS

Jurisdiction of U.S. Supreme Court is based upon grounds that the Washington Supreme Court decided law questions contra to and in direct conflict with U.S. Constitutional questions decided by the U.S. Supreme Court. Date of Washington Supreme Court judgment was October 28, 1986. See Exhibit A.

Rule 17(c) applies, but other considerations are also controlling.

The right of judicial discretion for federal Supreme Court Writ of Certiorari is under the Court's power to adjudicate based on subject matter jurisdiction. F.R.C.P. 12(h)(3), and F.R.C.P. 60(b)(2)(3)(4).

The Supreme Court has observed that the jurisdictional grant in Art III, § 2, exercised by Congress as exclusive jurisdiction (cf.28 U.S.C.A. § 1351), rested on higher considerations of PUBLIC POLICY.

See State of Washington v. Thomas Smith, 36 Wn.App. 133 (1983). "A claim involving a constitutional right will be considered for

the first time on appeal." Petitioners have been deprived of constitutional rights; therefore, this Writ should be granted.

Writ of Certiorari will be heard at discretion of the Court, subject to requirements of Title 28 U.S.C. §§ 636(a)(3)(4) and §§ 1291.

STATEMENT OF THE CASE

This is a case wherein defendants (PARAS) blocked easement roadway of plaintiffs (RALPHS) on an on-again-off-again basis from at least 1971 until filing of this suit in Sept.,1983.

RALPHS purchased lakeshore property on Lake Chelan in Oct., 1961, at which time Arnie and Darlene Stevens owned adjoining property and were the servient tenants with respect to any easement for roadway for benefit of dominant tenants, RALPHS. The Easement Grant of Sept. 25, 1961, gives RALPHS a right to a roadway easement and states that the servient tenants may locate the easement. The servient tenants, STEVENS, did orally and by accepted

usage allow RALPHS toreach their property by the path or trail then in existence, and TO PARK at the end of it for the period from 1961 until sale to PARAS in April, 1969, a period of eight years. On June 23, 1963, a document was executed by STEVENS and RALPHS, known as the STEVENS EASEMENT GRANT. <u>This document specified location of easement, AS ALLOWED BY THE EASEMENT GRANT OF SEPT. 25, 1961</u>, and further gave dominant owners (RALPHS) the right to place their drainfield beneath this roadway easement, which had already been done by oral agreement of the parties. There was no restriction in this document concerning parking, and parking was freely allowed, showing <u>intent</u>.

PARAS purchased STEVENS property in 1969. Although STEVENS EASEMENT was not recorded at that time, due to RALPHS' belief that STEVENS had recorded it (and vice versa), PARAS were told of the Stevens Easement, were given a copy of it, did know of drainfield, and did

see RALPHS drive to their property and park on the Easement, without making any effort to change the easement or restrict parking.

Therefore, by permissive use and intent of servient tenants, STEVENS, as evidenced by failure to restrict in Stevens Easement or otherwise, RALPHS used the Stevens Easement only, for a period of ten years, freely parking one or two vehicles near the end of it.

John Para testified that he made no effort to restrict RALPHS prior to 1971; he was "too busy" clearing rest of shack and debris from back of their lot. In approximately 1971 or 1972, Paras asked Ralphs to use this portion, now known as "Upper Easement". RALPHS allege they did not abandon Stevens Easement, that they did not at any agree to exchange easements, but that, due to ON-AGAIN-OFF-AGAIN blocking by Paras, so that there was no true and continuous permissive use, they gained prescriptive rights to a second easement, known as the "Upper Easement."

Twelve years use of "Upper Easement", plus twelve years continued occasional use of Stevens Easement, have gained prescriptive rights to both easements for ingress, egress and parking, is the claim of petitioners, IF permissive ten-year use of the Stevens Easement whereby parking was freely allowed did not already gain permanent parking rights to it, as the Sept. 1961 document gave Ralphs rights as dominant tenants to the Stevens-located easement, which was and is an easement appurtenant, running with the land, which cannot be changed or exchanged without permission of RALPHS, who have <u>not</u> given permission to exchange.

Petitioners never knew whether or not they could approach, or get reasonably near their property, depending on actions of PARAS. RALPHS claim emotional distress by harassment, loss of use and enjoyment, and rental income.

Further, in Aug., 1983, John PARA trespassed, cut three large branches of RALPHS'

very old tree, which hung over the lake and could not possibly have overhung or interfered with PARA property. Mr. Ralphs never gave permission and was completely ignorant of these mutilations until the branches had been discreetly and secretly removed by PARAS. This tree has three large sections, is almost fifteen feet in circumference, and is at least fifty years old.

RALPHS claim that PARAS have threatened to force RALPHS to move their drainfield located below surface of Stevens Easement, and have insisted RALPHS have said they would build a parking lot on upper end of their property (an illegal act, as Ralphs would haveto travel over government land to do so). PARAS deny that <u>they</u> repeatedly told dominant owners, RALPHS- to do so, and not to use PARA land for access. PARAS' Answer and Counterclaim mention the "parking lot", although this was denied by John Para at trial.

Plaintiffs have been unable to enjoy

their cabin due to continuing threats, harassment, and blocking of both easements throughout the years, including the last three years, and seek redress of injuries. The Stevens Easement is vitally important due to drainfield. Parking has been established by years of parking so that, regardless of which roadway or if both are designated as access roadway, petitioners should be allowed to park, and have gained this vested right, which has beengiven to others.

In the alternative, RALPHS claim that at the very least they have gained the right to "load and unload" under the "reasonable use" doctrine, as allowed by Post-Trial Order of the trial judge.

A R G U M E N T

QUESTION NO. 1: May the Appellate Court of Washington bypass Washington case law criteria of "reasonable use" for loading and unloading on an easement, and decide this issue on a legal basis NOT PRESENTED BY EITHER PARTY?

Petitioners contend that the question of the right to load and unload was not properly before the Appellate Court, and therefore should not even have been considered by that Court. Defendant/Respondent PARAS did not enter a Counter-Petition, but instead inserted this issue in their Responding Brief to RALPHS' initial Petition. There is no allowance in Washington Rules of Appellate Procedure (RAP) for this type of "bootstrapping" procedure.

When a trial judge has ruled that loading and unloading for fifteen minutes is "reasonable use" of an easement, the Appellate Court should not then be allowed to ignore all "reasonable use" arguments, criteria, and cases. When no proof of objection was placed into the record before the Appellate Court by PARAS, then PARAS waived their right to object, if they had not already waived their right by failure to Counter-Petition as set forth above. It is well established that the Response to any Petition must respond only to issues set forth in the Petition.

Additionally, "reasonable use" is the criteria

in Washington, and in other jurisdictions, concerning loading and unloading on an easement. Numerous cases were cited by Petitioners, including but not limited to the following:

Quoting from RALPHS' brief: "In our case at hand, loading and unloading does not interfere with the adjoining owner, because Paras CANNOT LEGALLY PARK on the road right-of-way because to do so would be to continue to block access of appellants; this right-of way must be kept free at all times in order to allow unrestrained and unlimited ingress and egressby appellants." p. 16 of brief.

"REASONABLE USE is the accepted criteria. (See 3 ALR3d... Reasonable use). Peck v. Mackowsky (1912) 85 Conn. 190., 82 A 199 is but one of numerous cases which holds this.

> "'Reasonable use' has been interpreted as 'such use as was reasonably necessary to the full enjoyment of plaintiff's premises." 3 ALR 3d 1246, citing Diller v. St. Louis, S. & P.R. R. Co. (1922)" p. 16,18, Ralphs' Brief.

See also Cameron v. Barton, 272 S.W. 2nd 40, 41 (Ky Ct. App. 1954), Michaelson v. Nemetz, 4 Mass. App. 806, 346 N.E. 2d, 925, 926 (1976). See also Thompson, Real Property § 426 (1980). Thus, in Ralphs' case, as in Logan v. Borderick, 29 Wn. App. 796, 631 P. 2d 429 (1981), the servient owner (PARAS) has the burden of proving MISUSE by loading and unloading (or by parking). Defendants failed to show at trial that parking, loading or unloading were a misuse of the roadway. Defendants did not meet their burden at trial by proving that either parking or loading and unloading interfered with their use, or that there was any misuse.

Wall v. Rudolph (1961) 198 Cal. App. 2d 684, 18 Cal. Rptr. 123, 3 ALR 3d 1242, holds likewise:

". . . a grant of an easement of way in general terms creates a general right of way capable of use in connection with the dominant tenement for all reasonable purposes. . ."

QUESTION NO. 2: Does a state have the right to interfere with individual property rights guaranteed under the United States Constitution by failing to recognize prevailing state law concerning adverse possession and easements?

Prevailing state law concerning adverse possession, easements, and prescriptive rights to park on an easement should have been recognized in this case. Failure to do so has deprived petitioners of property rights, as guaranteed under the 5th and 14th Amendments. For a state to fail to give credence to its own laws is impermissible. Adverse Possession and Prescriptive Rights are included under RCW 7.28.010. MORE THAN TWENTY-TWO YEARS OF PARKING, whether by permission and intent of STEVENS (original servient tenants), and/or by vesting of prescriptive rights to park on both easements, should mandate determination that PARAS, the present servient tenants, are estopped to

deny parking rights. Washburn v. Esser, 9 Wn.App. 169, 511 P.2d 1387 (1973), and York v. Cooper, 60 Wn.2d, 373 P.2d, 373 P.2d 493 (1962) are illustrative of cases which allow parking under circumstances similar to our case. The Supreme Court of the State of Washington did not say that these cases were over-ruled, and yet refused to apply them in this case.

Courts throughout the nation hold that a prescriptive right of parking can be created by prescription. 98 A.L.R. 1096. To prevent injustice, even in cases where the parking or usage of land is partly permissive, partly adverse, prescriptive rights are recognized. 27 A.L.R.2d 332.

Contra to the Appellate Court's Opinion (Exhibits B,C,D) on pages 6, 7, and 8, in which the Court states that dominant and subservient rights are common rights, not mutually exclusive rights, in an adverse claim, the use must be sufficiently exclusive to give notice of the

individual claim of right, and the use must be of such frequency as to apprise the landowner of the right being claimed against him. PRESCRIPTION is the acquiring of a right by lapse of time. Loading and unloading, and parking may be acquired by prescription under Washington statutes. Nocera v. DeFeo, 340 Mass. 783, 164 N.E.2d 136 ( ) delineates the concept of prescriptive rights.

In the case of Ralphs v. Para, John Para clearly stated that Ralphs parked "all over" his (Para's) land, and that he never gave permission for them to park on his land. This clearly establishes prescriptive parking, taken together with the time periods involved. Self-serving statements were taken as believable in this case; yet the complete testimony of Ralphs was not considered. Incorrect "facts" are cited by the Court of Appeals. Stevens were the servient tenants at the time of the original grant of Sept., 1961, NOT PARAS. Stevens were given the right to determine the exact location of the

easement, NOT PARAS. Parking was freely allowed "by intent" of the servient owner, Stevens, under their ownership, and then adversely continued under Paras, so that the twenty-two year period of continuous parking, even if reduced by the eight-year period under Stevens, meets the requirements for adverse possession and for prescriptive rights under Washington law, as set forth herein. Further, Paras allowed parking on the Stevens easement for an additional two-year period prior to clearing the "Upper Easement." TWELVE YEARS of adverse possession and parking suffices, yet if Paras contend they never allowed this, the period becomes even more extensive.

The Washington Court of Appeals decision fails to take into consideration that Petitioners loaded, unloaded, and parked on Paras' land continuously and exclusively for a period in excess of the statutory time period. Petitioners' acts absolutely fall

within the perimeters of RCW 7.28.010. Further, the fact that a car (i.e., a compact type) can turn the narrow corner and park on the badminton court in front of Ralphs' cabin is completely irrelevant to the difficulty of loading and unloading, carrying heavy objects up a hill a considerable distance. Ability to park cannot be equated with ability to "unload and carry heavy objects." Thus, petitioners were deprived of their rights to load and unload and rights to park, based on incorrect and irrelevant facts. This is a deprivation of property rights under the Constitution.

In this case, there has been a deliberate effort to confuse the facts of this case. At the time that Ralphs purchased their property, they did so only after obtaining an easement allowing them access to their property; the exact designation could not be given as Stevens, who then owned Para property, had not completed their

cabin and they were therefore given the right by the grantors to decide where the easement to Ralphs' property was to be, which they did. See copy of Stevens easement. This right was NOT GIVEN TO PARAS at any time by anyone. What is at stake in the decision in this case is whether a dominant tenant must be subject to having his right-of-way easement changed by each new owner, each new servient tenant. If so, as Washington courts have ruled in this case, then there is no true "easement appurtenant" to ANY land, no assurance of permanency of property rights. "Permission" claimed by Para's self-serving statements was successfully refuted by testimony of plaintiffs but the Appellate Court and Supreme Court ignored plaintiffs' testimony. Dunbar v. Heinrich, 25 Wn.App. 10, 605 P.2d 1272, affirmed 95 Wn.2d 20, 622 P.2d 812 (1980) and Bradley v. American Smelting and Refining, 104 Wn.2d 677 and 684, 709 P.2d 782

1985) argue for petitioners' rights in this case, as does Ingling v. Public Serv. Elec.& Gas, 10 NJ Super 1, 76 A.2d, 76 (1950) which holds that an easement may not be relocated by the owner of the servient tenement without consent of the easement holder. There is no showing that Ralphs ever consented to RELOCATION (except Paras' self-serving statements), or that Ralphs ever abandoned Stevens Easement.

The court arbitrarily "relocated" the Stevens easement, completely ignoring harm to plaintiffs due to fact that their drainfield was placed under Stevens road right-of-way by permission of Stevens in the Stevens Easement; the court therefore took away Ralphs' rights to this easement and the drainfield under it. Property rights were thereby denied without consideration of a legal document and intent of the owners (STEVENS) at time of purchase by RALPHS. "Relocation" of easement did excessively burden and harm RALPHS.

The bifurcated trial did not allow Ralphs to bring forth their long-time prescriptive rights and adverse possession rights, because Ralphs could only testify to a three-year period, instead of the twenty-two year period.

See Exhibits E and F, Stevens Easement, and Sept. 1961 Easement granting Stevens, as subservient tenant, the right to determine the location of easement.

QUESTION NO. 3: Did the trial judge deny petitioners due process and equal protection as guaranteed under Fifth and Fourteenth Amendments to the Constitution, by his actions whereby he prevented petitioners from presenting their theory of the case to the jury?

The trial judge, by answering Question No. 1 "NO", even though he admitted that he did not determine that defendants did not trespass and did not wrongfully cut three branches of Ralphs' tree, took Question Nos. 2 and 3 from the jury. Thus, Ralphs could

not present their theory of the case to the jury, because the judge himself wrongfully answered the jury's questions for them (1, 2, and 3), and, in addition, PRECONVICTED plaintiffs by Question 7 and Instruction 12. (See Exh. G) (See also Exhibits I and J).

The trial judge failed to explain that plaintiffs parked on the easement, or both of them, for approximately TWENTY TWO YEARS before this judge decided, AFTER THE FACT, that plaintiffs did not have the right to park. How else could Ralphs establish prescriptive rights? How else can anyone establish prescriptive rights? This is a question which concerns every state.

Ralphs, petitioners herein, were not allowed, by the bifurcation of this trial at the last moment, so to speak, and by the judge's decision to take this case from the jury (in the manner explained above) before the jury even had a chance to review it, to present their theory of the case and to

obtain a just decision.

The very fact that ONLY THE SUM OF $1.00 was awarded against RALPHS is indicative of the true decision of the jury, who had no choice, due to the judge's actions, except to rule against Ralphs. The two-week delay between the first part of the trial and the last part, due to inability of the court to continue hearing the case, was also detrimental to petitioner's rights, and would, in essence, act to "program" such a case to failure. Without the ability to take notes, such complex case cannot be "remembered" by jurors unfamiliar with easements, parking, trespassing, etc.

See copies of pages 54 and 64 of Ralphs' Brief (Exhibits H and G).

It should be noted that the Appellate Court stated:

"The jury found the Paras did not wrongfully cut branches off the Ralphs' tree nor block the easement, but the Ralphs did misuse the easement by parking on it causing damage to the Paras in the amount of $1.00."

Despite reiteration in both of Ralphs' briefs, this court states "the jury found" when it was the judge who decided to mark Verdict Question No. 1, so that Nos. 2 and 3 could not be answered, so THE JURY DID NOT FIND THIS.

The Constitution and What It Means Today, by Chase and Ducat (1974 Ed.) states therein, at p. 358, that

> ". . . a Federal judge must always make it clear to the jury that the final determination of all matter of fact rests with them, and that his remarks on such matters are advisory only."

The following cases are cited as authority: Quercia v. U.S., 289 U.S. 466 (1933), Glasser v. U.S., 315 U.S. 60 (1942), U.S. v. Dunmore, 446 F.2d 1214 (1971), and U.S. v. Wyatt, 442 F.2d 858 (1971). No authority is needed for the statement that a state judge is or should also be held to this same standard of performance. In this case, the trial judge took matters into his own hands and did not leave final determination to the jury. He was in an impermissible rush to terminate this case,

and preconvicted the petitioners by so doing.

Even though there was clear evidence of many instances of blocking, and only ONE INCIDENT IS REQUIRED to prove this, the jury was not allowed to reach this claim either, because of the judge's ruling AFTER THE FACT that Ralphs did not have the right to park, and his instruction to the jury with no explanation of time of effect of such determination, so that the jury was forced to conclude that this order "dated back" to "Day one" when Ralphs first purchased their property. The jury was not allowed to be told that Ralphs parked by adverse possession and prescriptive rights and because they had no alternative DUE TO BLOCKING BY PARAS which prevented Ralphs from reaching their property. Yet the Judge refused to overturn the verdict, despite extensive testimony and pictures of blocking presented by plaintiffs and defendants.

PARAS' pictures "convicted" them of blocking RALPHS, except that the jury could not reach this answer due to the "no right to park" instruction. If Ralphs could not reach their property due to blocking and therefore "reached" it as close as possible, having to remain on Para land due to the blocking by Paras, the wrongdoer, PARAS, the blockers, should not then have been placed in the position of the "victims", but this is exactly what the court did.

CONCLUSION

This is a case in which a state court has completely ignored plaintiffs' right to privacy, right to enjoy one's property without blocking one's access, without harassment, right to be free from unwarranted trespass on one's property, unwarranted cutting of one's tree branches down to its very base. This state court has also ignored plaintiffs' rights to easements, rights to parking after twenty-two years of parking on one or both easements, rights to load and unload (in lieu of parking), and other rights delineated herein. It is a case which, according to its decision, now allows any succeeding servient

tenant to change an easement appurtenant, thereby making it less than the original grant by such change. It is not a mere neighbor-to-neighbor squabble, as defendants tried to condescendingly point out. It is a property rights case, including deprivation of rights under the Fifth and Fourteenth Amendments, as well as those set forth under the Seventh and Ninth Amendments.

No instruction was allowed on "right to use and enjoyment." This was denied in Chambers--there is no record before the Appellate Court due to excessive cost of transcript for the entire bifurcated two-day-trial plus two week interval and then two more days of trial, BUT State of Washington v. Thos. Smith (1983), 36 Wn.App. 133, should have been applied, and should now be applied. Damages for mental distress from blocking, harassment, and TREE CUTTING should have been allowed. Damage to the tree was not allowed because no expert witnessed testified to the impossible--replacement of a tree over fifty years old, with circumference of over fifteen feet. "There is no need to admit expert testimony on a matter within

the common knowledge of laymen." State v. Smissaert, 41 Wn.App. 813 (1985). The jurors could have determined whether the figure of $1,000 asked by plaintiffs was reasonable or unreasonable, but the trial judge did not allow them to do so. It was for this reason that the judge marked "NO" on Question No. 1, so that this question could be bypassed--even though the "NO" answer was to a different question than the damages!

These constitutional issues have been raised in Plaintiffs' Briefs, at oral argument before the Appellate Court, and at the Washington Supreme Court level. These constitutional issues should be heard by this Court, and this Court is urged to consider this case in the broader context of rights of property owners, as well as rights of individuals, to freedom to enjoy their property and their lives in this United States.

Respectfully submitted,

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Case No._____ from WA. State Su-
U.S. Supreme Ct.; Term Oct.86 preme Ct.; PETITION
RALPHS v. PARA for WRIT OF CERTIORARI.

(copy of Su.Ct. letter, State of Washington, dated October 28, 1986 denying petition)

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Re: Supreme Court No. 53044-1 - Arthur M. Ralphs, et ux. v. John Para, et ux.

Court of Appeals No. 6915-0-III

Counsel:

The above petition for review was considered by the Court on its October 28, 1986, petition for review calendar.

The petition was denied by order number 153/158 filed on October 28, 1986.

Very truly yours,

/s/
REGINALD N. SHRIVER
Supreme Court Clerk

RNS:crf

EXH. A

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

ARTHUR M. RALPHS and BARBETTA M. RALPHS, husband and wife,	)	
Appellants,	)	No. 6915-0-III
v.	)	
JOHN PARA and CLARA PARA, husband and wife, and TOM PARA and GAIL PARA, husband and wife,	)	DIVISION THREE PANEL TWO
Respondents and Cross-Appellants.	)	Filed: Jun 26, 1987

GREEN, C.J.--Arthur M. and Barbetta M. Ralphs appeal a judgment in favor of John and Clara Para and Tom and Gail Para. The issues revolve around an easement, its location, use and acquisition; injunctive relief; and damage to a cottonwood tree.

In the fall of 1961, the Ralphs purchased lake front property on Lake Chelan. At that time Arnie and Darlene Stevens owned the adjoining property. On September 25, 1961, the Griffins, Farleys, and Greers granted the Stevens, Drakes, Hougens,

Danners, and Ralphs an easement which stated:

> Easement appurtenant to the land, of right of way for roadway now in use and existence over and across that portion of That part of Government Lot No. 2,in Section 33, Township 29 North, Range 21, East of the Willamette Meridian, lying Northerly and Easterly of 25-Mile Creek Highway, it being understood that the location of the said roadway may be changed by the owner of the subservient estate.

(Italics ours.) On June 27, 1964, the Stevens granted the Ralphs an easement which allowed the Ralphs a right of way including "the septic tank drainfield located beneath such road." This easement was not filed until May 10, 1976 but had the same location as the original easement. The Paras purchased the Stevens property, the servient estate, in April 1969. The Paras cleared the back of their lot, planted grass and in 1970 changed the location of the roadway easement and requested the Ralphs to use it. The new location was called the "upper easement". Difficulties developed over whether the Ralphs had a right to park in the easement and other matters. Also, in 1983 three

branches were cut off a large cottonwood tree on the Ralphs' property which intruded on the Paras' property.

These difficulties led the Ralphs, in September 1983, to file a petition for a permanent injunction enjoining the Paras from fencing or blocking the easement; cutting any portion of the Ralphs' cottonwood tree; and harassing or restricting the Ralphs from the free use and enjoyment of their property. The Ralphs also asked for damages for invasion of their right to the use and enjoyment of their property, mental paid and suffering, loss of income from inability to rent the property, attorney fees and costs.

Part of the case was tried to the court and part to a jury. The jury found the Paras did not wrongfully cut branches off the Ralphs' tree nor block the easement, but the Ralphs did misuse the easement by parking on it causing damages to the Paras in the amount of $1. The court held the

Ralphs presented no evidence of damage to their tree; the Paras could change the location of the easement and the location was changed in 1971 by mutual consent of the parties; the Ralphs had only one easement for ingress and egress across the Paras property; the Ralphs did not have the right to park on the easement and did not establish a right to any injunctive relief. The Ralphs appeal. The Court also gave the Ralphs the right to load and unload on the easement for 15 minutes only. From this order, the Paras appeal.

First, the Ralphs contend the court erred in concluding the Paras had the right to change the location of the easement as long as the relocation did not burden the Ralphs. We find no error.

Personal easements are not favored. Green v. Lupo, 32 Wn. App. 318, 323, 647 P.2d 51 (1982). The successors, either dominant or servient, to an easement have identical rights and burdens that their

predecessor possessed by virtue of the easement. 3 R. Powell, Real Property ¶ 418, at 34-217 (1985). Here the original easement specifically provided: "the location of the said roadway may be changed by the owner of the subservient estate." The Ralphs contend this privilege to change the location of the easement was personal to the original grantor and therefore only the Stevens could determine the location of the easement. Since no authority is cited to support this contention, it need not be considered. RAP 10.3(a)(5). It is noted the Stevens were not the original grantors of the easement. Thus, if the Ralphs' proposition is correct, even the Stevens could not change the location of the easement. In light of the rule that personal easements are not favored and in the absence of cited authority to support the Ralphs' contention, it must be rejected.

Furthermore, a servient owner may impose reasonable restraints on a right of way to avoid a greater burden on their estate than

originally contemplated by the easement so long as such restraints do not unreasonably interfere with the dominant owner's use. Green v. Lupo, supra at 324. The Ralphs have not pointed to any evidence in the record showing the change in the easement burdened them except as to the drainfield which the court held was not an issue in the case. In fact, there was testimony the Ralphs were happy with the new location of the easement because it brought them closer to their back door and that they acquiesced in this change of location by using it instead of the original easement.

The Ralphs also raise an issue regarding abandonment of the original easement. While mere nonuse of an easement does not constitute abandonment, Roggow v. Hagerty, 27 Wn. App. 908, 913, 621 P.2d 195 (1980), that is not the point here. The original easement grant allowed the servient landowner to change the location of that easement. The Paras, owners of the servient estate, moved the

location of the easement and the Ralphs acquiesced in the change by using the new upper easement.

The Ralphs' reference to Smith v. King, 27 Wn. App. 869, 620 P.2d 542, 24 A.L.R.4th 1049 (1980), is misplaced. That case holds at page 871:

> when an easement is granted in general terms without specifying a definite location, the grantee does not acquire a right thereby to use the servient estate other than as first designated by the grantor and the location cannot be changed thereafter by the grantee.

(Italics ours.) Applying that holding here: (1) the grant was in specific terms with a definite location given; (2) the grant specifically states the owner of the servient estate can change the location; and (3) the Paras, who changed the location, are not the "grantees".

Second, the Ralphs contend the court erred in concluding the parties mutually consented to a change of the location of the easement in 1971 and now are estopped from claiming a different location. It is gen-

erally held the consent of all interested parties is required to relocate an easement. Coast Storage Co. v. Schwartz, 55 Wn. 2d 848, 854, 351 P.2d 520 (1960); Annot., Relocation of Easements (Other Than Those Arising by Necessity); Rights as Between Private Parties, 80 A.L.R.2d 743, § 4, at 748 (1961). However, such consent may be implied from the acts and acquiescence of the parties. Scott v. Weinheimer, 140 Mont. 554, 374 P.2d 91, 96 (1962); see also Annot., 80 A.L.R.2d § 7, at 751 (1961). Here there was substantial testimony from the Ralphs themselves that they had acquiesced in the relocation of the easement by their continuous use thereof after Mr. Para asked Mr. Ralphs to use the new upper easement. Moreoever, when an easement grant contains language allowing the servient estate owner to relocate the easement, he can do so without the consent of the dominant estate owner. Van Laak v. Malone, 92 A.D. 2d 964, 460 N.Y.S 2d 654, 656 (1983). Here the original easement

authorized the relocation so that Paras could have changed the location without the Ralphs' consent.

Third, the Ralphs contend the court erred in concluding they had only one easement for ingress and egress across the Paras' property as the Ralphs had acquired the upper easement by prescription. What the Ralphs are in essence claiming is that they now have two easements across the Paras' property, the original easement by grant and the "upper easement" by prescription. However, as discussed earlier in this opinion, the Paras changed the location of the original easement which they had a legal right to do.

In order to obtain a prescriptive easement, the claimant must show: (1) use adverse to the title owner; (2) open, notorious, continuous and uninterrupted use for 10 years; and (3) the owner's knowledge of the adverse use when he was able to enforce his rights.

Bradley v. American Smelting & Refining Co., 104 Wn.2d 677, 694, 709 P.2d 782 (1985); Dunbar v. Heinrich, 95 Wn.2d 20,22, 622 P. 2d 812 (1980). mr. Ralphs testified "the only way [he has] been using what's been called an upper easement is by permission of the Paras" and the Ralphs were asserting no adverse claim but rather using the upper easement with the Paras' permission. He also testified the Ralphs' use was not continuous nor uninterrupted. Thus, there was no prescriptive easement. We find no error.

Fourth, the Ralphs contend the court erred in concluding they did not have the right to park on the easement or any other part of the Paras' property. They argue the original grant of a "right of way for roadway" obviously included parking, since it did not contain any restriction against it. It is also asserted since they parked

on the easement for over 20 years, the Paras are estopped from complaining, having taken no legal action to prevent the parking. We disagree.

In determining the scope of an easement, the court looks to the intention of the parties who originally created the easement, the nature and location of the property subject ot the easement and (the manner in which the easement has been used.) Evich v. Kovacevich, 33 Wn.2d 151, 157, 204 P.2d 839 (1949); Logan v. Brodrick, 29 Wn. App. 796, 799, 631 P.2d 429 (1981). The servient owner has the burden of proving misuse. Logan v. Brodrick, supra at 800. If the easement is ambiguous or silent on some point, the rules of construction call for examination of the situation of the property, the parties, and surrounding circumstances. Seattle v. Nazarenus, 60 Wn.2d 657, 665, 374 P.2d 1014 (1962); Rupert v. Gunter, 31 Wn. App. 27, 31, 640 P.2d 36 (1982). However,

it must be remembered that all easements are construed to be "right in common" rather than exclusive rights and thus the servient owner shares in the use which the easement permits the dominant owner. 3 R.Powell, Real Property 417, at 34-211 to -214 (1985).

> The expression "right of way" is a common expression occurring so frequently that it may be said that its meaning is well understood to be the right of a person to travel over a particular tract of land without interference.

(Italics ours.) Kalinowski v. Jacobowski, 52 Wash. 359, 362, 100 P. 852 (1909).

Here the original easement grant states: "Easement appurtenant to the land, of right of way for roadway now in use and existence over and across that portion . . ." (Italics ours.) Parking is not mentioned. It is unambiguously stated the easement is "over and across" the Paras' property. Also, it is undistputed the Ralphs were always attempting to park on the easement, but the Paras continually requested they not park

there. Mr. Para testified he needed to use the easement to reach his own property. We note the Ralphs did not want to park on their own property because of the only two possible parking areas, one was being used as a badminton court and the other area was occupied by a St. Jude shrine and trees. The court correctly concluded the Ralphs did not have the right to park on the easement. The easement was on of ingress and egress and did not include parking. There was no error.

Fifth, the Ralphs claim the court erred in concluding they did not establish a right to injunctive relief. They argue the Paras' deliberate acts of nuisance and continuous threats imposed mental anguish and fear of further harm totheir rights and interests in their cabin property. We find no error.

An injunction is an equitable proceeding with considerable inherent discretion vested in the trial court to shape and fashion

relief to fit the particular facts, circumstances and equities of the case. Brown v. Voss, 105 Wn.2d 366, 372, P.2d (1986). This court is required to give great weight to the trial court's exercise of discretion. Brown v. Voss, supra at 372; Rupert v. Gunter, supra at 30. The party seeking an injunction must show: (a) necessity, (b) irreparable injury, (c) a clear legal or equitable right, and (d) a well grounded fear of immediate invasion of that right. Agronic Corp. v. deBough, 21 Wn. App. 459, 464, 585 P.2d 821 (1978). The purpose of an injunction is not to punish a wrongdoer for past actions, but rather to protect a party from present or future wrongful acts. Agronic Corp. v. deBough, supra at 464; Lewis Pac. Dairymen's Ass'n v. Turner, 50 Wn.2d 762, 314 P.2d 625 (1957).

The Ralphs sought injunctive relief against the Paras for parking on and thus blocking the Ralphs' access to the easement,

and for trimming branches off the Ralphs' cottonwood tree. We hold the court did not abuse its discretion in denying the injunction. Mr. Para testified he wanted the Ralphs to enjoy their property and he would not block their right of way. As to the tree, whatever damage resulted by cutting off some branches has been done. The Ralphs failed to show any branches would be unlawfully cut off by the Paras in the future.

Sixth, the Ralphs contend the court erred in concluding they failed to present any evidence of damage to their cottonwood tree and directing a verdict in favor of the Paras on that issue. A wrongful severance of trees constitutes the tort of conversion. Grays Harbor Cy. v. Bay City Lumber Co., 47 Wn.2d 879, 289 P.2d 975 (1955); Bremerton Central Lions Club, Inc. v. Manke Lumber Co., 25 Wn. App. 1, 6, 604 P.2d 1325 (1979). RCW 64.12.030 and 64.12.040[1] provide the statutory measure of damages for conversion of timber. These statutes have been held ap-

plicable to ornamental trees and shrubs. Tatum v. R&R Cable, Inc., 30 Wn. App. 580, 583, 636 P.2d 508 (1981). RCW 64.12.040 allows mitigation of damages where "the defendant had probable cause to believe that the land on which such trespass was committed was his own, or that of the person in whose service or by whose direction the act was done. . ." The burden of proving mitigation is upon the one who caused the injury. Bremerton Central Lions Club, Inc. v. Manke Lumber Co., supra.

Here the record is clear the Paras assumed the burden and presented evidence of a mitigating factor--Mr. Para trimmed the Ralphs' tree at the direction of Mr. Ralphs. The Paras also introduced testimony of one of the neighbors who had seen Mr. Ralphs and Mr. Para trimming the tree together. There is ample evidence to support the jury verdict that the Paras did not

wrongfully cut branches from the tree. Thus, the issue of damages need not be considered.

Seventh, the Ralphs contend there was insufficient evidence to support the jury's answers on the special verdict form that the Paras had not blocked the Ralphs' easement, that the Ralphs had misused the easement, and the $1 damage award to the Paras. They also argue the court erred in refusing to admit the affidavit of a person unavailable as a witness. We disagree.

No authority is cited to support their contentions. RAP 10.3(a)(5). Therefore, we need not consider them on appeal.

. . . against the person committing such trespasses or any of them, if judgment be given for teh plaintiff, it shall be given for treble the amount of damages claimed or assessed therefor, as the case may be."

RCW 64.12.040 provides:

"If upon trial of such action it shall appear that the trespass was casual or involuntary, or that the defendant has probable cause to believe that the land on which such trespass was committed was his own, or that of the person in whose service or by whose

direction the act was done, or that such tree or timber was taken from uninclosed woodlands, for the purpose of repairing any public highway or bridge upon the land or adjoining it, judgment shall only be given for single damages."

Kwik-Lok Corp. v. Pulse, 41 Wn. App. 142, 702 P.2d 1226 (1985). Also, there is substantial evidence to support the jury verdict. The witnesses' testimony for the Paras and the Ralphs was conflicting as to the blocking of the easement. This conflict was resolved by the jury who chose to believe the Paras. No offer of proof was made or continuance requested regarding the unavailable witness and there was no error in denying the admission of the uncross-examined affidavit. Furthermore, the affidavit was cumulative on the issue of blocking.

There was also evidence and exhibits showing the Ralphs had parked all over the Paras' back yard, not just on the easement. Thus, tehre was sufficient evidence to establish misuse of the easement justifying the $1 award to the Paras.

Eighth, the Ralphs contend the court erred in bifurcating the trial because it prevented them from (a) refuting a prejudicial picture of parking which was taken after service of the complaint; (b) presenting to the jury their theory on their prescritpive right to the upper easement; and (c) explaining their parking on the easement was done in good faith. We disagree. We find nothing in the record before this court showing the Ralphs requested a jury trial on all issues, nor that they objected to the case being tried partially to the judge and partially to the jury, as required by RAP 2.5(a) in order to preserve the error for appeal. Aripa v. Department of Soc. & Health Servs., 91 Wn. 2d 135, 141, 588 P.2d 185 (1978).

Ninth, the Ralphs assign error to the giving of one of the jury instructions and to a question on the special verdict form. We need not decide these issues as no authority has been cited to support their contentions.

RAP 10.3(a)(5). Also, the Ralphs did not object or take exception to question 7[2] on the special verdict form therefore it cannot be considered on appeal. RAP 2.5(a). As to instruction 12[3], the issue of parking on the easement (discussed earlier in this opinion) was a question of law for the court and not for the jury, as it involved interpretation of unambiguous language in a document.

Finally, the Ralphs contend the court erred in failing to give separate instructions on the Ralphs' claim for loss of use and enjoyment of their property and their claim for loss of income. These claimed errors cannot be considered. The Ralphs' proposed instructions are not in the record before us. Moreover, the Ralphs have not given the numbers of their alleged proposed instructions, as required by RAP 10.3(g), nor did they set them out verbatim in their opening brief, as required by RAP 10.4(c). Moore

v. Smith, 89 Wn.2d 932, 940, 578 P.2d 26 (1978); Higgins v. East Valley Sch. Dist., 41 Wn. App. 281, 704 P.2d 630 (1985). Thus, we do not reach the alleged errors on this issue.

The Paras' assign error to the court's amended findings and conclusions allowing the Ralphs 15 minutes to load and unload on the easement, contending there is not evidence in the record to support such. We agree. Also, since the Ralphs, according to the trial court's and this court's decision, must park for extended periods of time on their own property, it logically follows they can also load and unload on their own property.

Affirmed in part; reversed in part.

A majority of the panel has determined that this opinion will not be printed in the Washington Appellate Reports but it will be filed for public record pursuant to RCW 2.06.040.

[1]RCW 64.12.030 provides in pertinent part:

"Whenever any person shall cut down, girdle or otherwise injure, or carry off any tree, timber or shrub on the land of another person,. . . without lawful authority, in an action against the person committing such trespasses or any of them if judgment be given for damages claimed or assessed therefore, as the case may be."

RCW 64.12.040 provides:

"If upon trial of such action it shall appear that the trespass was casual or involuntary, or that the defendant had probable cause to believe that the land on which such trespass was committed was his own, or that of the person in whose service or by whose direction the act was done, or that such tree or timber was taken from uninclosed woodlands, for teh purpose of repairing any public highway or bridge upon the land or adjoining it, judgment shall only be given for single damages."

[2]Question 7 of the special verdict form: "Did the plaintiff misuse the easement by parking on the easement?"

[3]Instruction 12: "You are instructed that the plaintiffs did not have the right to park on the easement."

s/ Green, CJ

WE CONCUR:

s/ Muvson, J.

s/ Thompson, I.

Case No. From Wa. St. Supreme
U.S. Supreme Ct.:Term Oct.86 Court for a Writ of
Ralphs, et ux v. Para, et ux. Certiori

STEVENS EASEMENT

June 27, 1964

Arnie and Darlene Stevens grant to Arthur and Barbetta Ralphs the right of easement for a road rightaway which includes the septic tank drainfield located beneath such road, the road being located 50 ft. southwest from the back of Stevens cabin on the side adjoining Ralphs and Stevens property and approximately 60 ft. from the back of Stevens cabin on the opposite side, and extending to a width of 12 feet.

s/ Arnold Stevens

s/ Darlene Stevens

As described as set forth in that deed of easement from Lee Martin Griffin and Cynthia Louise Griffin in Instrument No. 586670, Book 631, page 450, records of Chelan County Auditor, Wenatchee, Washington.

s/ Arnie Stevens

s/ Darlene Stevens/ Birchinal

(Stevens Easement)

SUBSCRIBED AND SWORN to before me this 10th day of May, 1976.

s/ Elizabeth A. Erickson/sp?

NOTARY PUBLIC in and for the State of Washington, residing at Wenatchee.

Fee $2.00: Filed for Record on May 10, 1976

Arthur Ralphs

CHELAN COUNTY AUDITOR

WENATCHEE, WASH.

(copy of EASEMENT dated Sept. 25, 1961)

EASEMENT

THE UNDERSIGNED, LEE MARTIN GRIFFIN and CYNTHIA LOUISE GRIFFIN, husband and wife, NEIL R. FARLEY and ELAINE C. FARLEY, husband and wife,and LON G. GREER and EDNA G. GREER, husband and wife, for valuable consideration, the receipt of which is hereby acknowledged, here give and grant to the present owners of lake shore lots in part of Government Lot 2, Section 33, Twp. 29N, Range 21, E.W.M., namely, ARNIE STEVENS and DARLENE N., husband and wife, HARVEY L. HOUGEN and ELIZABETH C., husband and wife, LEE J. DRAKE and ARLENE K., husband and wife, IVAN R. DANNER and ADELAIDE, husband and wife, A.M. RALPHS and BARBETTA, husband and wife, the following:

Easement appurtenant to the land, of right of way for roadway now in use and existence over and across that portion of that part of Government Lot No. 2, in Section 33, Township 29

North, Range 21, East of the Willamette Meridian, lying Northerly and Easterly of 25-mile Creek Highway, it being understood that the location of the said roadway may be changed by the owner of the subservient estate.

IN WITNESS WHEREOF, the parties hereto set their hands this 25th day of Sept., 1961.

/s/ Lee Martin Griffin s/Cynthia Louise Griffin

/s/ Neil R. Farley s/Elaine C. Farley

/s/Lon G. Greer s/Edna G. Greer

- -

NOTE: Signatures on this document are duly notarized by W. Kenneth Kingman on Oct.4, 1961 for LEE MARTIN GRIFFIN, CYNTHIA LOUISE GRIFFIN, LON G. GREER and EDNA G. GREER, and by John W. Sutton on Sept. 25, 1961 for NEIL R. FARLEY and ELAINE C. FARLEY.

Document is recorded under #586670, Book 631 Page 450, Chelan County, State of Washington.

> "Adverse possession is a mixed question of law and fact. Whether the essential facts exist is for the trier of fact, but whether the facts, as found, constitute adverse possession is for the court to determined as a matter of law."

Consequently, the jury should have been permitted to make the fact determination first, before the court reached the question in law, as to whether or not there were permissive or prescriptive rights to one or both easements as a matter of law. Plaintiffs were unable to present to the jury supporting and substantial evidence to SUSTAIN plaintiffs theory of the case under this bifuracted trial procedure.

Added to this is the blatant prejudice of the trial judge as shown by a verdict question that could only be answered AGAINST plaintiffs, due to the jury instruction that gave no choice to the jury. (Verd. Question 7 AND Jury Instruction 12). The jury was also prevented from correctly deciding blocking due to the court's

refusal to allow plaintiffs to explain that their parking was in good faith due to circumstances which they could not present to the jury; the jury was unable to know the true circumstances under such a system.

ERROR NO. XIII: THE COURT ERRED IN ITS PRE-CONVICTION OF PLAINTIFFS BY PRESENTATION OF QUESTION NO. & AND INSTRUCTION NO. 12 TO THE JURY.

ISSUE NO. 1: May the court give an instruction to the jury which predetermines the answer to a question on the Jury Verdict Form ?

Question No. 7 is: "Did the plaintiffs misuse the easement by parking on the easement?"

Instruction No. 12 is "You are instructed that the plainfitts did not have the right to park on the easement."

The phrasing of Question No. 7 mandated that the jury must answer it "Yes" (against the plaintiffs) due to Instruction No. 12.

Case No._____ From WA.State Su.Ct. for U.S. Su.Ct.; Term Oct 86 PETITION FOR WRIT OF CERTIORI
RALPHS v. PARA

(copy of p. 54 of Plaintiffs' Brief)

"ISSUE NO. 4 RE THE ANSWERING OF QUESTION NO.1 FALSELY: In Washington, it is established that the jury is presumed to follow the court's instructions. Washington v. Fondren, 41 Wn.App. 17 (1985). The trial judge clearly states the untruth of his answer to Question #1, that it was only for the court's convenience (because the court had worked on the instructions all day). RP 532 1-20

> "Why, when question number one says, did the defendant wrongfully cut three branches, and apparently, you have determined the defendants did not trespass and did not wrongfully cut these three branches, is that correct?" (Plaintiff to Judge)
>
> "Court: 'NO.'

In other words, the court DID NOT DETERMINE that defendant was innocent of trespass and cutting the tree, yet chose to allow the jury to believe that was the determination, in order to expedite the trial! The judge goes on to state that,

> ". . .could have been retyping of all the verdict forms, all the concluding instruction, revising instructions, redrafting instructions and retyping instructions. And I mean several hours. This determination on the motion was made just prior to the instructions. So the Court made the decision that it did."

"The court stated a lie to the jury, and admitted it. Is this not abuse of discretion so blatant as to warrant reversal, with a verdict for plaintiffs?

"Instruction #13 takes the issue of the cutting of the tree completely out of the jury's hands. (RP 423, 24, 25) (RP 515 1-25) (RP 516, 1-25) EVEN IF plaintiffs did <u>not</u> prove monetary damages, the issues of harassment, loss of use and emotional. . . " (continued on next page not quoted)

. . . in favor of defendants on this part of plaintiffs' case and answered Question No. 1 on the Special Verdict Form "No", and jury was instructed to start with Question no. 4 on the Special Verdict Form.

The jury made the following answers to the Special Verdict Form submitted by the court.

We, the jury, make the following answers to the questions submitted by the court:

QUESTION NO. 1: Did the defendants wrongfully cut three (3) branches off of plaintiffs' tree?
ANSWER: No (Yes or No)
(If your answer is "No", then go on to Ques.No.4)

(NOTE BY PETITIONER--This questioned was answered by judge, not jury)

QUESTION NO. 2: If your answer to Question No. 1 is "Yes", then answer the following:
Was the cutting of the tree by defendants a proximate cause of injury or damage to the plaintiffs?
ANSWER_____(Yes or No)
(If your answer is "No", then go on to Question No. 4.)

(NOTE: Jury unable to answer since judge ans.#1)

QUESTION NO. 3: If your answers to Questions No. 1 and 2 are "Yes", then answer the following: What is the total amount of damages to the plaintiffs proximately caused by the cutting of the tree by the defendants?

(Note: Jury unable to answer since judge answered #1)

ANSWER: $_____

QUESTION NO. 4: Did the defendants block the plaintiffs' easement?

ANSWER: No (Yes or No)

Case No._____ From WA. State Su.Ct.
U.S. Su.Ct.; Term OCT 86 for WRIT OF CERTIOR-
RALPHS v. PARA ARI

(copy of Judge's "Colloquy" explaining why he did not allow jury to answer Question No. 1)

. . ."the record, and for my understanding why, when question number one says, did the defendant wrongfully cut three branches, and apparently, you have determined the defendants did(not) trespass and did not wrongfully cut these three branches, is that correct?"

(above question by plaintiff Barbetta Ralphs)

"THE COURT: No. The whole issue in question, the reason for the dismissal of the claim was that there was no proof of damages in regard to the claim concerning the cutting of the branches on the trees. There are no proof of damages as required by statute in the case law concerning ornamental shrubbery or trees. As far as a reason, the cause of action was stricken to instruct the jury to proceed to discuss the other issues. By answering the first question no, allows the Jury then to go on to the next set of questions

dealing with blocking of the easement. It's for those reasons that the Court instructed the Jury. Could have been retyping of all the verdict forms, all the concluding instructions but the Court spent hours today reviewing instructions, redrafting instructions and retyping instructions. And I mean several hours. This determination on the motion was made just prior to the instructions. So the Court made the decision that it did. The Court did note that this cause has now gone to the Jury. . . "